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COMMENTS

AMENDING THE FOREIGN CORRUPT PRACTICES ACT OF 1977: A STEP TOWARD CLARIFICATION AND CONSOLIDATION

I. INTRODUCTION

In 1976, following leads provided by the Watergate Special Prosecutor's Office,¹ the Securities and Exchange Commission ("SEC") reported high levels of questionable and illegal payments by United States corporations to foreign officials.² In spite of evidence that unilateral action to halt such activity would inevitably place United States companies at a competitive disadvantage in overseas markets *vis à vis* foreign companies which were free to resort to such payments,³ Congress enacted the Foreign Corrupt Practices Act of 1977⁴ (the "FCPA" or the "Act"). It sought "to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business sys-

¹ See *Foreign and Corrupt Bribes: Hearings on S. 3133 Before the Senate Committee on Banking, Housing, and Urban Affairs*, 94th Cong., 2d Sess. 3 (1976) [hereinafter cited as *Foreign and Corrupt Bribes*]. Senator Proxmire observed that "[t]he wave of disclosure [of overseas payments] is really the result of some threads that began unravelling when the Watergate Special Prosecutor got into domestic bribery." See also *Multinational Corporations and Foreign Policy: Hearings Before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations*, 94th Cong., 1st Sess., Part 12, 1 (1975).

² See SEC Report on Questionable and Illegal Corporate Payments and Practices FED. SEC. L. REP.(CCH) No. 642, pt. II, at 2 (May 19, 1976). [hereinafter cited as SEC Report]; S. REP. NO. 114, 95th Cong., 1st Sess. 3, 123 CONG. REC. 13059 (1977) [hereinafter cited as S. Rep. No. 114]; H.R. REP. NO. 640, 95th Cong., 1st Sess. 4, 123 CONG. REC. 31404 (1977) [hereinafter cited as H.R. REP. NO. 640]; *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Hearings on S. 305 Before the Senate Committee on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 1 (1977).

³ *Developments in the Law — Securities Regulation — Foreign Corrupt Practices Act of 1977*, 19 HARV. INT'L. L.J. 726 (1978). But cf. 123 CONG. REC. 36305 (1977), where testimony before Congress indicated that American companies did not need to engage in foreign bribery in order to remain competitive in international markets.

⁴ Pub. L. No. 95-213, tit. I, 91 Stat. 1494 (1977) (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff).

tem.”⁵ The method by which the FCPA is designed to end illegal payments by Americans to foreign government officials is twofold: first, the FCPA criminalizes certain forms of foreign bribery committed by United States citizens, corporations, and other entities; and second, the FCPA imposes accounting standards and internal controls upon reporting companies under the Securities Exchange Act of 1934 (“the 1934 Act”).⁶

Since the enactment of the FCPA in 1977, there has been criticism that ambiguities in the Act cause many companies to forego legitimate business opportunities to ensure compliance with the Act’s provisions.⁷ In an effort to address these criticisms, Congress is considering legislation which, *inter alia*, attempts to clarify the major ambiguities of the Act and consolidate enforcement of the Act’s antibribery provisions in the Department of Justice.⁸ The Act would be renamed the “Business Accounting and Foreign Trade Simplification Act.”⁹

This Comment will examine the proposed legislation in light of the history, policy objectives and present enforcement of the FCPA and will reach two conclusions. First, although the proposed bill clarifies the major ambiguities in the Act, it also creates a number of loopholes which should be tightened in order to deter successfully the egregious foreign bribery which prompted the enactment of the FCPA in 1977. For example, both the FCPA and the proposed bill exempt certain “grease” payments from the prohibitions against illegal payments, although the latter defines these payments more clearly. To avoid entangling questions of the intent or custom underlying the payment, however, a dollar limit or minimal value test should be established.

Second, this Comment concludes that the consolidation of enforcement responsibilities of the Act in the Justice Department is crucial to the consistent enforcement of the antibribery provisions. Although the SEC has agreed not to sue companies which proceed with transactions

⁵ S. REP. NO. 114, *supra* note 2, at 4. *Accord* 13 WEEKLY COMP. PRES. DOC. 1909 (Dec. 21, 1977).

⁶ 15 U.S.C. §§ 78a-78kk (1976).

⁷ See *Business Accounting and Foreign Trade Simplification Act: Joint Hearings Before the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 385-87 (1981) [hereinafter cited as *Hearings on S. 708*].

⁸ S. 708, 97th Cong., 1st Sess., 127 CONG. REC. S2126 (daily ed. Mar. 12, 1981) [hereinafter cited as S. 708]. Senator John Chafee proposed the legislation, which the Senate Committee on Banking, Housing, and Urban Affairs amended after hearings. See S. REP. NO. 209, 97th Cong., 1st Sess. 1, 10-11 (1981) [hereinafter cited as S. REP. NO. 209]. In November, 1981, the Senate passed the bill, which is currently pending in the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce.

⁹ S. 708, *supra* note 8, § 101.

that have been approved by the Department of Justice, this does not necessarily imply agreement with the Justice Department decisions. Thus, two companies involved in identical transactions could be treated differently if one firm did not seek Justice Department approval.

Thus, if the proposed Act is truly to further the original objectives of Congress, it must be revised. Ambiguities and inconsistencies currently in the Act serve only to confuse American corporations and hinder their international business transactions. Congress should act promptly to resolve the remaining problems in the Act in order to provide American businesses with a clear set of guidelines for determining the legality of payments to foreign officials.

II. THE LEGISLATIVE HISTORY OF THE FCPA

Congress enacted the FCPA after extensive study of the issues surrounding illegal or improper payments by American companies in connection with their overseas business.¹⁰ The problem of foreign bribery by American corporations first came to light during investigations by the Watergate Special Prosecutor's office into illegal domestic campaign contributions.¹¹ An SEC inquiry into these illegal contributions revealed that the payments were made possible by falsified corporate financial statements which concealed the source and application of corporate funds.¹² Additionally, the SEC investigations revealed the existence of "slush funds" from which money was discharged for bribes and other illicit purposes.¹³

¹⁰ See, e.g., S. REP. NO. 114, *supra* note 2; H.R. REP. NO. 640, *supra* note 2; H.R. REP. NO. 831, 95th Cong., 1st Sess., 123 CONG. REC. 38466, 38776 (1977) [hereinafter cited as H.R. REP. NO. 831]; S. REP. NO. 1031, 94th Cong., 2d Sess. (1976) [hereinafter cited as S. REP. NO. 94-1031]; *Hearings on Political Contributions to Foreign Governments Before the Subcommittee on Multinational Corporation of the Senate Committee on Foreign Relations*, 94th Cong., 1st Sess. Part 12 (1975); *Hearings on the Activities of American Multinational Corporations Abroad Before the Subcommittee on International Economic Policy of the House Committee on International Relations*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Hearings on the Activities of American Multinational Corporations Abroad*]; *Prohibiting Bribes to Foreign Officials: Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs*, 94th Cong., 2d Sess. (1976); *Foreign Payments Disclosure: Hearings Before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Foreign Payments Disclosure*]; *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. (1977); *Unlawful Corporate Payments Act of 1977: Hearings Before the House Committee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (1977).

¹¹ SEC Report, *supra* note 2, at 2.

¹² *Id.* See also Note, *Corruption and the Foreign Corrupt Practices Act of 1977*, 13 U. MICH. J.L. REF. 158, 159 (1979).

¹³ Note, *supra* note 12; SEC Report, *supra* note 2, at 3. The SEC also became aware of bribery through routine investigations, such as that conducted in SEC v. United Brands, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,420, in which the SEC investigated United Brands following the suicide of its Chief Executive Officer, Eli Block. The SEC

The SEC believed that these corporate contributions were of sufficient interest to investors to warrant disclosure. Moreover, the existence of the hidden funds made financial statements filed with the SEC inaccurate.¹⁴ Consequently, the SEC initiated enforcement and voluntary disclosure programs.

In the enforcement program, the SEC brought a number of injunctive actions against corporations. In the majority of cases, the corporations consented to the entry of a judgment of permanent injunction without admitting or denying the allegations of the complaint.¹⁵ The consent decrees usually ordered the corporation not to make any future payments that would violate the federal securities laws. In addition, the corporation agreed to establish a special review committee to examine the payments made, analyze the corporation's accounting procedures, and make recommendations to its board of directors.¹⁶

The SEC, however, was unsure of its statutory authority to conduct the enforcement program and therefore began a voluntary disclosure program.¹⁷ It encouraged corporations which chose to participate in this program to conduct their own investigations and audits to uncover bribes, illegal political contributions, or other questionable payments.¹⁸ By the time Congress enacted the FCPA, more than 450 corporations

inquiry disclosed that United Brands, one of the world's largest banana producers, had paid an Honduran official \$1.25 million in order to reduce a new export tax on bananas. United Brands had paid the official through a foreign subsidiary, which had accounted for the payment on its books as "commissions" and had deposited the money in a Swiss bank account for the official. See Comment, *The Foreign Corrupt Practices Act: Curse or Cure?*, 19 AM. BUS. L.J. 73, 74 (1981); *Hearings on the Activities of American Multinational Corporations Abroad*, *supra* note 10, at 37.

¹⁴ Note, *supra* note 12, at 158; SEC Report, *supra* note 2, at 3.

¹⁵ SEC Report, *supra* note 2, at 4.

¹⁶ *Id.*; Note, *In Search of an International Solution to Bribery: The Impact of the Foreign Corrupt Practices Act of 1977 on Corporate Behavior*, 12 VAND. J. TRANSNAT'L. L. 359, 360-61 (1979). The consent decree entered into by Lockheed is a well-publicized example. As a result of this consent decree, Lockheed was permanently enjoined from future violations and was required to establish a special committee of non-management directors or other unaffiliated persons to investigate the unlawful use of corporate funds. In addition, Lockheed was required to take appropriate action based on the special committee's findings and draft a statement of corporate policy to be placed on file with the SEC. [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,509.

¹⁷ See Note, *supra* note 16, at 361, where the author notes that the enforcement program was criticized as being entirely outside the jurisdiction of the SEC because the decrees prohibited substantive conduct and sought regulation of the corporation's accounting practices. See also Lowenfels, *Questionable Corporate Payments and the Federal Securities Laws*, 51 N.Y.U. L. REV. 1, 4-7 (1976); Note, *Disclosure of Payments to Foreign Government Officials Under the Securities Act*, 89 HARV. L. REV. 1848, 1853 (1976).

¹⁸ Note, *supra* note 16, at 361; SEC Report, *supra* note 2, at 6-13. The investigation was to be conducted by independent outside counsel and auditors who were required to answer to a committee of independent or outside board members. A final report was to be filed with the SEC on Form 8-K.

had voluntarily disclosed questionable or illegal payments to foreign government officials, politicians, and political parties, totalling in excess of \$300 million.¹⁹

The voluntary program also encountered a number of problems.²⁰ First, the program overestimated the power of independent directors and outside counsel to compel disclosure of payments. Second, the consent decrees often contained ambiguous language. Finally, because the Freedom of Information Act and newspaper reporting prevented the SEC from keeping the disclosures completely confidential, corporations became increasingly reluctant to comply with the voluntary disclosure program.²¹

As a result, Congress held hearings on the question of improper payments to foreign government officials by United States corporations.²² A plethora of policy considerations were presented to Congress

¹⁹ See note 2 *supra*; see also Note, *The Foreign Corrupt Practices Act: Problems of Extraterritorial Application*, 12 VAND. J. TRANSNAT'L L. 689, 690 n.6 (1979). Citing various news magazine articles, the author provides examples of some of these questionable or illegal payments. Bell Helicopter, a subsidiary of Textron, Inc., reported kicking back \$297,000 to an official in Ghana to facilitate an aircraft sale in that country. A \$2.9 million payment by Bell in connection with the sale of helicopters to Iran was also reported. In addition, Gulf Oil Corporation reported spending \$10.3 million on gifts, entertainment and other items related to political activity in the United States and abroad, including \$4 million given to the political party of the late South Korean President Park Chung Hee. General Tire and Rubber Company disclosed that its affiliates paid \$18,600 to a Venezuelan government official to obtain confidential tax returns of competitors. General Tire also gave \$500,000 to Mexican purchasing agents to escape taxes and paid \$6 million in "consultants' fees" and \$4.4 million in "commissions" in Algeria to win contracts and ensure the cooperation of customs officials. Exxon Corporation acknowledged paying \$1.2 million in 15 foreign countries "to secure or influence government action." Exxon's Italian subsidiary made unauthorized commercial payments and political contributions totalling \$19 million. Also, Westinghouse Electric Corporation reported improper payments to a foreign business agent in Manila in order to obtain a major share of Philippine nuclear plant construction contracts. See Holt & Wolcott, *The Missing Memo*, NEWSWEEK 22 (May 22, 1978); *The Philippines: Tales from Disneyland*, TIME 56 (Jan. 23, 1978).

²⁰ Note, *supra* note 16, at 362.

²¹ See, e.g., *supra* note 19; *Hearings on S. 708*, *supra* note 7, at 331.

²² See *supra* note 10. See also Lashbrooke, *The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem*, 12 CORNELL INT'L L.J. 227, 229 n.7 (1979) where the author notes that at the beginning of the Senate hearings, some Cabinet members believed that pre-FCPA laws, such as the International Security Assistance and Arms Export Control Act of 1976, Export-Import Bank regulations, and various tax laws were adequate to deter foreign bribes. Secretary of the Treasury William E. Simon thought that the activities of the IRS, SEC, and Departments of State and Defense represented a significant response to the problems of foreign corrupt practices. *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure*, *supra* note 10, at 91-93. In addition, Secretary of Commerce Elliott Richardson felt that new legislation on foreign corrupt practices was not needed at the time. *Id.* at 84. Lashbrooke notes, however, that as the hearings proceeded, the attitude of many of these officials changed. Secretary of Commerce Richardson began to believe that the most vigorous enforcement of existing laws would be inadequate. *Prohibiting Bribes to Foreign Officials*, *supra* note

during these hearings, which culminated in the adoption of the FCPA. The legislative history provides at least five distinct policy objectives.

First, Congress believed that the payment of bribes was counter to the moral expectations and values of the American public.²³ Second, Congress was concerned over the public scandals engendered by bribery and the resulting foreign policy problems for the United States when friendly governments were embarrassed.²⁴ Third, Congress wanted to prevent the distortion of commercial competition caused by bribery.²⁵ Fourth, Congress wished to prevent the spread of corruption in friendly governments.²⁶ Fifth, Congress sought to minimize foreign mistrust of American business and to improve the American reputation for honesty in business dealings.²⁷

In contrast to the policy considerations in favor of prohibiting corporate bribery of foreign officials, two major arguments were advanced to justify corporate payments to foreign officials. First, it was argued that bribery is an accepted business practice in many foreign markets.²⁸ For example, in Latin America and the Middle East, local agents are customarily used to negotiate contracts with local governments. Prior to the enactment of the FCPA, a Defense Security Assistance Agency memorandum suggested that firms should pay large fees to local agents and should give the agents discretion to distribute the money among local officials.²⁹ The larger the fee, the greater the "influence" [which] can be applied to all personnel in the governmental decision-making

10, at 39-67. *See also infra* note 79. Richardson also reported that President Ford believed that the current law was insufficient to deal adequately with foreign corrupt practices. *Id.*

²³ *See* S. REP. NO. 114, *supra* note 2, at 4-5; H.R. REP. NO. 640, *supra* note 2, at 5; S. REP. NO. 1031, *supra* note 10, at 3-4.

²⁴ H.R. REP. NO. 640, *supra* note 2, at 5. The House Report summarized the damage to the nation's foreign policy interests as follows:

[Revelations of corporate bribery] shook the Government of Japan to its political foundations and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations. In another instance, Prince Bernhardt of the Netherlands was forced to resign from his official position . . . In Italy, alleged payments . . . to officials of the Italian Government eroded public support for the Government and jeopardized U.S. foreign policy, not only with respect to Italy and the Mediterranean area, but with respect to the entire NATO alliance as well. The report also stated that exposure of corporate bribery could damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the expropriation of overseas assets. *See also* S. REP. NO. 114, *supra* note 2, at 3-4; S. REP. NO. 1031, *supra* note 10, at 3.

²⁵ *See* S. REP. NO. 114, *supra* note 2, at 4-5; S. REP. NO. 1031, *supra* note 10, at 3-4; H.R. REP. NO. 640, *supra* note 2, at 5.

²⁶ H.R. REP. NO. 640, *supra* note 2, at 5.

²⁷ *See Foreign and Corrupt Bribes, supra* note 1, at 63, 68.

²⁸ *See* N. JACOBY, P. NEHENKIS & R. ELLIS, *Bribery and Extortion in World Business* 6-7 (1977).

²⁹ *See* Note, *supra* note 12, at 160; *Hearings on the Activities of American Multinational Corporations Abroad, supra* note 10, at 100.

chain."³⁰ In addition, failure to make these payments could offend the foreign firm and result in the termination of the contract or venture.

Second, the argument was advanced that the unilateral regulation of bribery would not necessarily improve business morality. Rather, such regulation would result in a loss of business to foreign competitors who were free to engage in payments to foreign officials.³¹ Further, payments considered bribes by the United States might be considered legitimate commissions in the foreign country in which they were made.

Upon balancing these arguments, Congress determined that it was necessary to enact a strong anti-bribery statute in order to alter the behavior of United States corporations abroad. Consequently, Congress passed the FCPA, which President Carter signed into effect on December 19, 1977.³² Since the FCPA was so broadly drafted, however, many American businesses were unable to determine whether their actions fell within the parameters of the Act.

III. THE PROVISIONS OF THE FCPA

A. IN GENERAL

Although included by amendment within the Securities Exchange Act of 1934, the FCPA expands the traditional scope of the 1934 Act by applying to all domestic concerns,³³ rather than only to reporting companies.³⁴ As enacted, the Act consists primarily of three sections: section 102 contains the accounting and disclosure provisions of the Act; sections 103 and 104 contain the anti-bribery provisions prohibiting improper payments to foreign officials.

Section 102³⁵ requires issuers of securities registered under section

³⁰ *Hearings on the Activities of American Multinational Corporations Abroad*, *supra* note 10, at 101.

³¹ *See* Note, *supra* note 16, at 363.

³² On May 5, 1977, the Senate Bill, S. 305, sponsored by Senators Proxmire and Williams, was considered and unanimously passed by the Senate. 123 CONG. REC. 13816 (1977). On November 1, 1977, the corresponding House bill, H.R. 3815, was considered and passed by the House. 123 CONG. REC. 36303 (1977). These two bills differed in many important respects. *See* H.R. REP. NO. 831, *supra* note 10, at 9. The compromise, which became the FCPA, was worked out in conference. The final bill passed the Senate on December 6, 1977, 123 CONG. REC. 36306 (1977), and passed the House on the following day. 123 CONG. REC. 36308 (1977).

³³ The FCPA defines a "domestic concern" as:

any individual who is a citizen, national, or resident of the United States; or . . . any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

15 U.S.C. § 78dd-2(d)(1).

³⁴ A reporting company is an issuer of securities which is registered or required to file reports under the 1934 Act. *Id.* § 78dd-1(a).

³⁵ *Id.* § 78m(b)(2). Section 102 is the new § 13(b)(2) of the 1934 Act.

12 or required to file under section 15(d) of the 1934 Act to (1) make and keep books and records, in "reasonable detail," which accurately and fairly reflect the firm's transactions and asset dispositions,³⁶ and (2) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that certain standards will be met in accounting for the firm's assets. Section 102 was intended to prevent the use of off-the-books "slush funds" from which payments were made to foreign officials to influence the officials' decisions.³⁷

The congressional conference committee adopted a standard of reasonableness, recognizing that any absolute standard would result in unrealistic demands on management.³⁸ The committee agreed that management's decision as to the reasonableness of the firm's recordkeeping and internal control systems should be based upon a cost/benefit analysis which considers such factors as the size of the business, the diversity of operations, the degree of centralization of financial and operating management, and the amount of contact by top management with day-to-day operations.³⁹ The committee did, however, make absolute the obligation to have and maintain internal controls; this obligation applies to all reporting companies, regardless of whether the company operates abroad.⁴⁰

Sections 103 and 104 contain the anti-bribery provisions of the FCPA. Section 103 provides criminal penalties for payment by a securities issuer, or certain persons connected with an issuer, to any foreign official, foreign political party, or candidate for foreign political office, if the purpose of the payment is to induce the foreign official to use his or her influence to assist the company in obtaining or retaining business.⁴¹

³⁶ *Id.* (Emphasis added.) The conference committee qualified the "accurate and fair" standard by requiring only "reasonable detail." See *infra* note 38 and accompanying text.

³⁷ See SEC Report, *supra* note 2, at 2; H.R. REP. NO. 831, *supra* note 10, at 10.

³⁸ H.R. REP. NO. 831, *supra* note 10, at 10.

³⁹ S. REP. NO. 114, *supra* note 2, at 6.

⁴⁰ A discussion of the accounting provisions of the Act in further detail is beyond the scope of this comment.

⁴¹ This section (except for § 103(b)(2)) amends § 30 of the 1934 Act and establishes § 30A. The section, codified at 15 U.S.C. § 78dd-1, states:

(a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to —

(1) any foreign official for purposes of —

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

Also included in the class of recipients to whom payment is prohibited are persons who the issuer knows or has reason to know will directly or indirectly offer the payment for prohibited purposes.⁴² Section 104, the domestic concerns section, contains identical provisions for persons and domestic enterprises other than reporting companies.⁴³

An issuer or domestic concern convicted of violating the anti-bribery provisions of the Act is subject to severe penalties. Upon conviction, a reporting company or domestic concern may be fined up to one million dollars.⁴⁴ Individuals convicted of willfully violating the Act may be fined up to \$10,000 or imprisoned for up to five years, or both.⁴⁵ Additionally, in accordance with the SEC's policy against corporate indemnification of fines imposed for willful violations of the securities laws, the FCPA does not allow a company to indemnify convicted officers, directors, shareholders, employees, or agents.⁴⁶

At present, the SEC and the Justice Department share responsibility for the enforcement of the FCPA. The SEC has the duty to enforce the accounting provisions of section 102 and is responsible for the civil enforcement and regulatory implementation of section 103. To carry out its enforcement duties, the SEC may conduct investigations, initiate

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;
(2) any foreign political party or official thereof of any candidate for foreign political office for purposes of —

(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of —

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality;
in order to assist such issuer in obtaining or retaining business for or with or directing business to, any person.

⁴² This covers situations where consultants or commercial agents are employed abroad. S. REP. NO. 114, *supra* note 2, at 10.

⁴³ 15 U.S.C. § 78dd-2. *See* note 33 *supra*.

⁴⁴ 15 U.S.C. §§ 78ff(c)(1), 78dd-2(b)(1)(A).

⁴⁵ *Id.* §§ 78ff(c)(2), (3), 78dd-2(b)(1)(B), 78dd-2(b)(2), (3). These individuals include any officer, director, or stockholder acting on behalf of the issuer and, predicated upon a judicial finding of an issuer's liability, an issuer's employees or agents who willfully conduct prohibited activities.

⁴⁶ *Id.* §§ 78dd-2(b)(4), 78ff(c)(4).

administrative proceedings, and request injunctive and other equitable relief from the courts.⁴⁷ The SEC must refer possible criminal cases to the Justice Department, which also has responsibility for the civil and criminal enforcement of section 104, the domestic concerns provisions.⁴⁸ Although the Act makes no express provision for a private right of action, the courts are not explicitly prohibited from implying such an action.⁴⁹

B. AMBIGUITIES IN THE FCPA

Controversy has surrounded the FCPA since its enactment in 1977. Critics of the Act have argued that the lack of clarity in the Act's provisions and the incorporation into the statute of standards which are not realistic in the practical world of international commerce have resulted in excessive costs and significant losses in foreign sales, service, and construction contracts.⁵⁰ They contend that many firms, in fear of violating the Act, are foregoing legitimate business opportunities. Since there is practically no interpretive case law or regulatory history under the Act,⁵¹ there is much confusion as to whether the anti-bribery provisions of the Act apply to certain commercial transactions.

One of the major ambiguities concerns the circumstances under which a company is liable for the acts of its officers, directors, employees, agents, stockholders, subsidiaries, or partners. Under the Act, it is clear that stockholders, acting in the company's behalf, may be liable for violations of the anti-bribery provisions.⁵² It is not clear, however, whether officers and directors must be acting on behalf of the company or

⁴⁷ S. REP. NO. 114, *supra* note 2, at 11-12; H.R. REP. NO. 640, *supra* note 2, at 9-10.

⁴⁸ H.R. REP. NO. 640, *supra* note 2, at 9. If the Attorney General believes that any domestic concern, or its officer, director, employee, agent, or stockholder is engaged in or is about to engage in an act prohibited by the anti-bribery provisions, the Attorney General may seek a permanent or temporary injunction against the offending party.

⁴⁹ It is clear that the House intended for a private cause of action to exist. H.R. REP. NO. 640, *supra* note 2, at 10. The Senate deliberately refrained from taking a position on this issue. [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶81,701. In *Cort v. Ash*, 422 U.S. 66, 78-85 (1975), the Supreme Court set forth four factors to be used by the federal courts in determining whether a private right of action may be implied in a federal statute: (1) whether the plaintiff is a member of the class for whose "especial" benefit the statute was enacted; (2) whether the legislative history indicates an explicit or implicit intent to create or deny a private action; (3) whether implication is consistent with the underlying purpose of the legislative scheme; and (4) whether the area is one traditionally relegated to state courts for resolution. This author agrees with a recent law review note which concluded that the United States Supreme Court's present construction of the implication doctrine does not support an implied private action under the FCPA. See Note, *Effective Enforcement of the Foreign Corrupt Practices Act*, 32 STAN. L. REV. 561, 570-76 (1980). But cf. Note, *supra* note 12, at 188 n.179.

⁵⁰ See, e.g., Gustman, *The Foreign Corrupt Practices Act: A Transactional Analysis*, 13 J. INT'L L. & ECON. 367, 381, 400 (1979).

⁵¹ *Id.*

⁵² 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

whether they may incur liability through actions of a personal or non-company business nature.⁵³

The Act is also unclear regarding a company's liability for improper payments by subsidiaries. The Act's prohibitions against bribery specifically exclude foreign subsidiaries of United States corporations operating abroad.⁵⁴ Thus, section 103 requires that the United States issuer at least authorize or participate in the prohibited conduct, even if it is a postpayment authorization. The Act may impose liability, however, if the parent company benefits from a bribe made by its foreign subsidiary and has knowledge that the bribe was made. Consequently, it could be argued that, by not intervening to prevent the illegal payment, the parent implicitly approved the bribe.⁵⁵

The liability of a company for the actions of joint venture partners and prime contractors is also ambiguous under the Act. If a firm is a minority partner in a joint venture, it may be unable to control the payment of bribes to foreign officials in spite of its efforts to the contrary.⁵⁶ Again, it is unclear whether the Act would impose liability in such circumstances. Arguably, the company would have neither approved nor acted directly or indirectly in furtherance of the illegal payment.⁵⁷

A second major area of ambiguity in the Act concerns the activities which make a transaction "corruptly in furtherance" of gaining influ-

⁵³ The Senate bill covered "any officer, director, employee or stockholder thereof acting on behalf of such issuer." (Emphasis added.) S. REP. NO. 114, *supra* note 2, at 17. The conference committee changed the wording of the bill to cover "any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer . . ." (Emphasis added.) H.R. REP. NO. 831, *supra* note 10, at 12. The change in language appears to require that only the stockholder must be acting on behalf of an issuer; an officer or director of a corporation who acts without that corporation's authority may still be convicted under the FCPA. The Act makes clear that employees' and agents' liability is predicated upon the issuer's conviction. See *supra* notes 41 and 45; see also Note, *supra* note 12, at 166-68. Some courts have questioned whether a corporation can be held criminally liable for the implicitly authorized acts of its officers. Note, *supra* note 12, at 166 n.41. See, e.g., *Commonwealth v. Beneficial Finance Co.*, 275 N.E.2d 33 (Mass. 1971), *cert. denied*, 407 U.S. 914 (1972). The federal courts have held corporations criminally liable where an officer has acted within the scope of his employment, regardless of whether his conduct was expressly authorized. See, e.g., *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960); *United States v. Johns-Manville Corp.*, 231 F. Supp. 690 (E.D. Pa. 1963).

⁵⁴ H.R. REP. NO. 831, *supra* note 10, at 13-14. The original House Bill, H.R. 3815, would have extended the coverage of the FCPA to domestically controlled foreign subsidiaries. The conference committee, however, decided not to extend coverage to foreign subsidiaries in order to avoid jurisdictional and enforcement questions and unnecessary antagonisms with foreign governments. See 123 CONG. REC. 36307 (1977).

⁵⁵ 123 CONG. REC. 36307-08 (1977); see also Baruch, *The Foreign Corrupt Practices Act*, 57 HARV. BUS. REV. 32, 48 (1979).

⁵⁶ See *Hearings on S. 708*, *supra* note 7, at 253.

⁵⁷ Georges, *The Foreign Corrupt Practices Act Review Procedure: A Quest for Clarity*, 14 CORNELL INT'L L.J. 1, 61-62 n.15 (1981).

ence.⁵⁸ In order to impose liability under the Act, the plaintiff must prove that the payment was made "corruptly."⁵⁹ Although the legislative history indicates that Congress intended for the corruption requirement to be used to exclude persons engaged in essentially benign transactions, the full parameters of the corruption requirement are not clear.⁶⁰ For example, the Act does not indicate the extent to which the word "corruptly" protects business entertainment of foreign officials and courtesy gifts. A literal reading of the Act suggests that any gifts to foreign officials or any entertainment would be prohibited if intended to induce the foreign officials to use their positions in order to direct business to the payor. Congress, however, may not have meant to prohibit small gifts that are of insufficient value to induce a government official to misuse his position, especially in countries where such gifts are customary.⁶¹ In addition, it is unlikely that Congress intended to prohibit tours of company offices and factories, including transportation, meals, hotel, and entertainment expenditures, in order to familiarize and encourage foreign officials to use the company's methods and facilities.⁶² Yet the Act does not specifically exclude or discuss these payments, and thus leaves United States businesses without guidelines as to the consequences of engaging in these transactions.

A third area of ambiguity concerns the distinction between ministe-

⁵⁸ See *supra* note 41.

⁵⁹ The burden of proving that the payment was made corruptly rests upon the prosecutor or plaintiff. 15 U.S.C. §§ 78dd-1, 78dd-2.

⁶⁰ The Senate Report explained the corruption requirement as follows:

The word "corruptly" is used in order to make clear that the offer, promise or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient.

S. REP. NO. 114, *supra* note 2, at 10. The House Report set forth a somewhat similar explanation:

The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation, or regulations, or to induce a foreign official to fail to perform an official function. The word "corruptly" connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word "corruptly" indicates an intent or desire wrongfully to influence the recipient. It does not require that the act be fully consummated or succeed in producing the desired outcome.

H.R. REP. NO. 640, *supra* note 2, at 7-8. The domestic bribery statute has been interpreted by the courts as requiring an intentional violation motivated by evil. See, e.g., *United States v. Strand*, 574 F.2d 993 (9th Cir. 1978); *United States v. Evans*, 572 F.2d 455, 480-81 (5th Cir. 1978); *United States v. Brewster*, 506 F.2d 62, 71 (D.C. Cir. 1974). See also Elden & Sableman, *Negligence Is Not Corruption: The Scienter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV. 819, 823-28 (1981).

⁶¹ Georges, *supra* note 57, at 60 n.13; see Sprow & Benedict, *The Foreign Corrupt Practices Act of 1977: Some Practical Problems and Suggested Procedures*, 1 CORP. L. REV. 357, 361 (1978).

⁶² Benedict, *supra* note 61, at 361 (1978).

rial and discretionary officials. It is clear from the language and legislative history of the Act that the prohibition of payments to foreign officials does not apply to those "whose duties are essentially ministerial or clerical."⁶³ Thus, bribes made as "grease money" or facilitating payments to expedite a bureaucratic, clerical activity are legal, while bribes made to persons with discretionary powers in order to influence their actions are illegal.⁶⁴ The terms "grease" and "facilitating" payments, however, are not defined in the Act. Arguably, these terms could include bribes to customs officials to obtain lower-than-normal duties or bribes to license-granting authorities to obtain import or export licenses or industrial property protection that is not allowed by law. On the other hand, Congress may have intended to limit these payments to, for example, gratuities to customs officials to speed the processing of documents or payments to obtain adequate police protection.⁶⁵

The distinction between ministerial and discretionary officials raises even further questions. An investigation by a company to determine the nature and scope of a government employee's duties will not provide immunity against the imposition of sanctions after a later, contrary determination by the Justice Department.⁶⁶ In the event that a clerical official exceeds his ministerial functions, however, the FCPA "business purpose" test would probably be applied. This test requires that the payment must be intended to assist a company in "obtaining," "retaining," or "directing" business.⁶⁷

The language of the Act appears to indicate that if the duty to be performed by the foreign official is not intended to obtain, retain, or direct business, but merely to move a matter more quickly to an eventual act or decision, a facilitating payment made to the official would be permitted. In contrast, the legislative history of the Act appears to indicate that in determining whether a payment to a particular person is exempt from the Act, the focus should be on the nature of the foreign

⁶³ 15 U.S.C. §§ 78dd-1, 78dd-2. A foreign official is defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality." *Id.*

⁶⁴ H.R. REP. NO. 640, *supra* note 2, at 8; S. REP. NO. 114, *supra* note 2, at 10.

⁶⁵ S. REP. NO. 114, *supra* note 2, at 10.

⁶⁶ H.R. REP. NO. 831, *supra* note 10, at 12.

⁶⁷ For the text of the provision see *supra* note 41. The business purpose test, however, excludes payments to obtain favorable regulation or legislation. Thus, the bribe paid by United Brands to officials in the Honduran government for the purpose of obtaining a reduction in the export tax does not fall within the prohibitions of the Act. See *supra* note 13. The legislative history does not provide a rationale for this omission. Congress may have intended to exclude all payments which did not relate to obtaining, retaining, or directing business.

official's job, not on the particular act that he is paid to perform.⁶⁸ Thus, a payment to a foreign official with discretionary power would arguably be illegal, even if the action paid for was essentially ministerial.

It is also important to note that the distinction between prohibited and non-prohibited payments does not depend upon the amount of the payment.⁶⁹ The Justice Department, however, may infer that larger amounts are intended to be passed on to higher officials.⁷⁰ Thus, businesses engaging in such transactions may have to consider not only the recipients of the payments, but also the size of the payments.

A fourth area of ambiguity concerns the prohibition of payments to any person "while knowing or having reason to know" that all or a portion of the payment will be passed on to a foreign official, political party, party official, or candidate.⁷¹ This provision prohibits indirect payments to foreign officials through intermediaries, such as consultants and sales agents, who sometimes pass on part of their fees to government officials in order to achieve a desired sale.⁷² Local agents often play a critical role in obtaining business overseas and in some countries, the use of agents is required by law.⁷³

The legislative history of the FCPA does not indicate under what circumstances a company should have "reason to know" that an agent is making illegal bribes. Thus, many companies are uncertain about the extent to which they must investigate an agent's practices. Others fear that in countries where bribery is commonplace, the "reason to know" provision will be presumed in all cases.⁷⁴ Some companies are requiring their sales agents to sign agreements in which they pledge not to bribe foreign officials in their work for the company. The Justice Department, however, has stated that a mere contract provision, without other affirmative precautionary steps, will not insulate a company from liability for its agents' improper actions.⁷⁵

⁶⁸ Georges, *supra* note 57, at 59 n.12. Georges notes that this conclusion is supported by Senator Tower's remarks:

We discussed the possibility of excluding payments to secure the performance of essentially ministerial or clerical duties but rejected it in favor of a test that would look to the type of officer involved — not to the particular duty he was being asked to perform.

H.R. REP. NO. 831, *supra* note 10.

⁶⁹ The Federal Trade Commission (FTC), however, has placed a \$1,000 limit on payments which can be made by the Lockheed Corporation. This amount appears to define the FTC's limit for "grease" or facilitating payments. 347 TRADE REG. REP. 7 (CCH) (Aug. 21, 1978).

⁷⁰ Georges, *supra* note 57, at 60 n.12.

⁷¹ 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3).

⁷² See *supra* notes 29 and 30; S. REP. NO. 114, *supra* note 2, at 10.

⁷³ Georges, *supra* note 57, at 61 n.14.

⁷⁴ *Id.*

⁷⁵ *Id.*; U.S. DEPT. OF JUSTICE, FOREIGN CORRUPT PRACTICES REVIEW PROCEDURE, RELEASE NO. 80-03 (Oct. 29, 1980).

The fifth major area of ambiguity in the Act concerns payments to foreign political parties and candidates for public office. The FCPA forbids these payments for the purpose of obtaining, retaining, or directing business.⁷⁶ A political contribution made by an issuer, or person connected with an issuer, is not proscribed if it is not intended to influence the official in obtaining, retaining, or directing business or if it is legal in the country where made.⁷⁷ Thus, the intention of the payor is determinative.

The Act, however, does not indicate what factors must be present to impose liability. Contributions made with the best motives could still be considered corrupt if made under certain circumstances. Thus, unless the payor is motivated *solely* by an interest in the general policies of the government or the strengthening of a particular party, he or she could be in danger of violating the Act.⁷⁸

Finally, even though a payment may fall within one of the several exceptions to the Act, a number of other laws may still impose liability. Department of Justice officials have indicated that they will not be constrained by the "intent of Congress," as manifested by the exemptions under the Act, and will prosecute companies that make payments proscribed by other statutes.⁷⁹ Thus, many companies are concerned that

⁷⁶ 15 U.S.C. §§ 78dd-1(a)(1)(B), (3)(B), 78dd-2(a)(1)(B), (2)(B), (3)(B).

⁷⁷ *Id.* §§ 78dd-1(a), 78dd-2(a).

⁷⁸ Georges, *supra* note 57, at 62 n.16. For example, the awarding of a major contract to a company that made a substantial contribution to a political candidate or party might indicate an improper motive. Thus, a company might be advised to refrain from seeking government contracts either before or soon after an election. As Georges noted, this would put companies in the anomalous position of desiring the election of a candidate for general political reasons, but being financially penalized by his success at the polls. *Id.*

⁷⁹ See Note, *supra* note 19, at 701-02, where the author noted that a number of domestic statutes require the disclosure of questionable payments. For example, the Export-Import Bank requires all companies dealing with buyers financing purchases through the Bank to report all commissions included in the contract price. Deliberate falsification of reports violates 18 U.S.C. § 1001 (1976). In addition, the International Security Assistance Act and the Arms Export Control Act, 22 U.S.C. § 2312 (1976), require reports of payments, including political contributions and agents' fees, made or offered to secure the sale of governmental and commercial military items abroad. The Foreign Military Sales Act, 22 U.S.C. § 2751 (1976), also requires disclosure to purchasing governments and the Department of Defense of any agent's fees included in the contracts. Fees considered questionable by the Defense Department or unacceptable by foreign governments are not allowed as costs under such contracts. Moreover, the Foreign Assistance Act, 22 U.S.C. § 2399 (1976), requires firms conducting business under its jurisdiction to report all commissions connected with sales to the Agency for International Development. Companies who make questionable payments may also violate the general criminal statutes proscribing mail and wire fraud, 18 U.S.C. §§ 1341, 1343 (1976), and conspiracy to defraud the United States. 18 U.S.C. § 286 (1976). Additionally, under 18 U.S.C. § 953 (1976), United States citizens are prohibited from attempting directly or indirectly to influence the conduct of a foreign government in relation to disputes or controversies with the United States. Finally, since payments that are lawful under the Act, such as "grease" payments, may be material to the purchasing decision of an

conduct which would be lawful under the FCPA could nevertheless be prosecuted under other statutes.

The ambiguities in the Act are of special concern to business because of the lack of interpretive case law or enforcement history under the FCPA. Companies fear not only the risk of successful prosecution under the Act, but also the possibility of being charged with FCPA violations and receiving the resultant adverse publicity. Thus, in order to prevent companies from foregoing otherwise legitimate business opportunities, Congress is attempting to clarify the ambiguities of the Act.

C. ENFORCEMENT OF THE FCPA

Ambiguities in the law are often clarified by interpretive case law and enforcement history. Enforcement of the FCPA by the SEC⁸⁰ and the Justice Department,⁸¹ however, has been sporadic. There are many reasons why the two agencies have brought so few actions.⁸² For example, the necessary evidence may be in the possession of a United States citizen living abroad, a foreign subsidiary, or even a foreign national who has no link to the United States. If this obstacle is surmounted, the fifth amendment right against self-incrimination may still prevent the use of subpoenaed documentary evidence against individual officers and directors. Moreover, depositions taken abroad may not withstand sixth amendment claims to the right of confrontation. Finally, any attempted prosecution, whether or not successful, may cause American companies to lose business or may damage United States foreign relations.⁸³

This lack of enforcement history has left many companies in a legal void. Fearing that uncertainties about the scope of the Act's prohibitions were causing United States companies to "forego legitimate export opportunities," President Carter, in 1978, directed the Justice Department to provide the private sector with written guidance concerning its enforcement priorities.⁸⁴ As a result, the Justice Department issued a

investor, they may be subject to disclosure. Arguably, the willful failure to report a material payment could constitute criminal fraud under 18 U.S.C. § 1001 (1976). *See* SEC Report, *supra* note 2, at 16-32.

⁸⁰ *See* SEC v. Page Airways, Inc., 464 F. Supp. 461 (D.D.C. 1978); SEC v. Aminex Resources Corp., [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,458 (D.D.C. 1978); SEC v. Dresser Indus., Inc., 453 F. Supp. 573 (D.D.C. 1978); SEC v. Katy Indus., Inc., [1978] SEC. REG. & L. REP. (BNA) at A-1.

⁸¹ *See* United States v. Kenney Int'l Corp. [1979] 516 SEC. REG. & L. REP. (BNA) A-2, A-3 (D.D.C. 1979); United States v. Carver, [1979] 498 SEC. REG. & L. REP. (BNA) A-12 (S.D. Fla. 1979).

⁸² *See* Lashbrooke, *supra* note 22, at 236-40.

⁸³ *Id.* at 240. *See also* Note, *supra* note 49, at 569-70.

⁸⁴ Slade, *Foreign Corrupt Payments: Enforcing a Multilateral Agreement*, 22 HARV. INT'L L.J. 117, 118 (1981); Statement on United States Export Policy, 14 WEEKLY COMP. PRES. DOC. 1633 (Sept. 26, 1978).

public announcement of enforcement priorities⁸⁵ and established a Review Procedure "permitting any party covered under [the anti-bribery provisions of the Act] to seek a statement of the Department's present enforcement intention concerning proposed business conduct [under those provisions]."⁸⁶

Under the Review Procedure, the Criminal Division, upon receiving a request for review of a proposed transaction, may (1) state its present enforcement intention under sections 103 and 104 of the Act with respect to the proposed business conduct;⁸⁷ (2) decline to state its present enforcement intention;⁸⁸ or (3) take such other position or action as it considers appropriate.⁸⁹ The Criminal Justice Division may also, in its discretion, refuse to consider a review request.⁹⁰

Although the subject of the review request must be an actual transaction, the request need not involve only proposed conduct. The Criminal Division, however, will only comment on the portion of the request which concerns proposed conduct; it will not comment on past transactions.⁹¹ Review requests must be specific and "contain in detail all relevant and material information bearing on the conduct for which review is requested and on the circumstances of the proposed conduct."⁹² Unlike review letters under the Antitrust Review Procedure,⁹³ review letters issued under the FCPA Review Procedure are binding upon the Criminal Division,⁹⁴ but only as to the parties joining the request.⁹⁵ A review letter, however, will not bind or obligate any other agency.⁹⁶ Thus, the

⁸⁵ Slade, *supra* note 84, at 119 n.10. Former Assistant Attorney General Phillip Heymann stated that the Justice Department, in determining whether to prosecute a case under the FCPA, would attach the most significance to: (1) whether the bribe was paid in a market in which all the other competitors are United States companies; (2) whether the bribe was paid in a country making an effort to enforce domestic legal prohibitions against such conduct; (3) the level of the official bribe; (4) the ratio of the bribe to the underlying economic transaction; (5) the past conduct of the corporation; and (6) the level of the corporate officials involved in consummation of the bribe. *Id.*

⁸⁶ 28 C.F.R. § 50.18 (1981).

⁸⁷ *Id.* § 50.18(h). For a more detailed discussion of the FCPA Review Procedure see Georges, *supra* note 57, at 70-86.

⁸⁸ 28 C.F.R. 50.18(h); see U.S. DEP'T OF JUST., FOREIGN CORRUPT PRACTICES ACT REVIEW PROCEDURE RELEASE NOS. 80-01, 80-02, 80-04 (Oct. 29, 1980).

⁸⁹ 28 C.F.R. § 50.18(h).

⁹⁰ *Id.* § 50.18(d).

⁹¹ *Id.* § 50.18(b).

⁹² *Id.* § 50.18(f).

⁹³ *Id.* § 50.6(9) provides, "[a] business review letter states only the enforcement intention of the [Antitrust] Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest."

⁹⁴ *Id.* § 50.18(k).

⁹⁵ *Id.* § 50.18(e); see also U.S. DEP'T OF JUST., *supra* note 88, at 80-01, 80-02, 80-04.

⁹⁶ 28 C.F.R. § 50.18(l).

SEC could bring a civil enforcement action against a party, subject to its jurisdiction under section 103 of the Act, for a transaction already cleared by the Criminal Division.

Recently, the SEC has stated that it will not take enforcement action alleging violations of section 103 against any party that has received clearance from the Justice Department under the Review Procedure.⁹⁷ The SEC, however, did not obligate itself to refrain from enforcing the Act's accounting and recordkeeping requirements. Thus, the Review Procedure states that a review letter shall not "in any way alter the responsibility of the party or parties to comply with the accounting requirements of section 102 of the Foreign Corrupt Practices Act."⁹⁸ For parties such as "domestic concerns," which are not subject to SEC jurisdiction, clearance by the Criminal Division would "provide complete protection from enforcement action" under the FCPA.⁹⁹ A review letter, however, would not prevent the Justice Department from prosecuting parties to the transaction under other laws, unless "specifically cited in the particular review letter."¹⁰⁰

Although the Criminal Division is bound only with respect to the requesting party, it attempts to provide guidance to the business community at large by publicizing the core of individual review requests and its decisions on them. Thus, the Justice Department publicly releases information describing the identity of the party or parties submitting a review request, the general nature and circumstances of the proposed conduct, and the Criminal Division's enforcement decision.¹⁰¹ In order to enable some parties to keep all of a portion of the information supplied to the Criminal Division confidential, the Review Procedure includes a provision whereby a party may ask the Criminal Division "to delay or to refrain from ever making publicly available parts of a review request, and part or all of any information or documents submitted in support of the review request."¹⁰²

The FCPA Review Procedure is intended to clarify the ambiguities

⁹⁷ Securities Exchange Act Release No. 34-18255 (CCH) FED. SEC. L. REP. ¶ 26,629 (Nov. 12, 1981).

⁹⁸ 28 C.F.R. § 50.18(m).

⁹⁹ Georges, *supra* note 57, at 72.

¹⁰⁰ 28 C.F.R. § 50.18(l).

¹⁰¹ *Id.* § 50.18(o)(2).

¹⁰² *Id.* § 50.18(o)(1). To avoid public disclosure, a party must: (1) specify precisely the information that it asks not to be made public; (2) state the minimum period of time during which nondisclosure is considered necessary; (3) justify the request for nondisclosure by showing that the material consists of trade secrets or commercial and financial information that is privileged and confidential under Exemption 4 of the Freedom of Information Act, or is exempt under any other provision of Act. *Id.* § 50.18(o)(1). If the Justice Department determines that grounds for nondisclosure do not exist under the FOIA, the Department will notify the party submitting the review request of its determination at least seven days before

in the Act that have posed unintended obstacles to legitimate foreign trade by United States businessmen.¹⁰³ Individual review would theoretically eliminate ambiguity by providing a definitive statement of the government's position on the application of a law to a particular course of action.¹⁰⁴ Until recently, however, companies under the jurisdiction of both the Justice Department and the SEC could not rely solely upon Justice Department approval due to the divided enforcement responsibilities under the Act. Although the SEC still refuses to participate in the administration of the Review Procedure, to formally coordinate its interpretation and enforcement of the Act with the Justice Department, and to provide guidance on its own,¹⁰⁵ the SEC's policy not to prosecute any party for bribery, where that party has received Justice Department clearance, permits an assured means of resolving ambiguities in the enforcement of the FCPA.

The SEC's policy, however, does not improve the Review Procedure's ability to offer general guidance to the business community at large. The review releases represent only the position of the Justice Department. Although the SEC has agreed not to sue companies which receive favorable review letters, this does not necessarily imply agreement with Justice Department review decisions. Thus, the SEC could bring an enforcement action against a company that relied on a Justice Department decision but did not itself seek individual review, even though the company's international transaction was identical to the conduct previously approved.¹⁰⁶ At best, therefore, the Review Procedure releases can only provide predictability as to how the Justice Department will apply the provisions of the FCPA.¹⁰⁷

IV. PROPOSED AMENDMENTS TO THE FCPA

A. HISTORY AND GENERAL PROVISIONS OF S. 708

Shortly following the adoption of the FCPA, Wallace Timmeny, the deputy director of the SEC's Division of Enforcement and the offi-

any information is released. *Id.* This seven-day period allows companies to seek judicial action to prevent disclosure of information considered by the company to be confidential.

¹⁰³ Georges, *supra* note 57, at 79.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; FED. SEC. L. REP. (CCH) ¶ 26,628 (Aug. 28, 1980). The SEC has emphasized, however, that while it does not formally coordinate its interpretation and enforcement of the Act with the Justice Department, "it work[s] closely with the Justice Department in administering the bribery prohibitions." *Id.* The SEC has stated that it is "aware of no difference of substance between the Commission and the Department of Justice with respect to interpretation of the bribery prohibitions." *Id.*

¹⁰⁶ Georges, *supra* note 57, at 82. For other problems with the Review Procedure, see *id.* at 82-86.

¹⁰⁷ *Id.* at 82.

cial responsible for enforcing the anti-bribery provisions of the Act, set forth his views regarding enforcement of the anti-bribery provisions.¹⁰⁸ He advised United States businesses to follow three main principles in interpreting the FCPA. First, American businesses must investigate all "red flags." "Red flags" include not only allegations subject to investigation, but also general indications, such as the "knowledge" that bribes are common in the country in which they conduct business.¹⁰⁹ Second, a United States concern has a duty not only to investigate "red flags" waved in its face, but also to search for "red flags" in the absence of suspicious circumstances.¹¹⁰ Third, a business that cannot assure itself that its foreign affiliates are not engaged in bribery has a duty to stop doing business in the foreign country.¹¹¹

Many people, including Cabinet-level officials of the Reagan Administration, point to Timmeny's analysis as evidence that the Act is overbroad and unreasonable.¹¹² This broad interpretation, especially of the "reason to know" provision, has been the impetus for proposed legislation intended to narrow the reach of the anti-bribery provisions.¹¹³ Critics of the Act and proponents of the pending legislation contend that the FCPA stifles United States overseas business, forces United States businesses to act like private detectives, permits prosecutors to second-guess businesses, and imposes a vague negligence standard.¹¹⁴

Senator John Chafee (Republican, R.I.) introduced the proposed legislation, S. 708, on March 12, 1981. After a subcommittee of the Senate Committee on Banking, Housing, and Urban Affairs reported the bill favorably, it passed the Senate in November, 1981. It is currently pending before the House Committee on Energy and Commerce.¹¹⁵ Although the new legislation would rename the FCPA the "Business Accounting and Foreign Trade Simplification Act," the goal of the proposed bill remains the same: outlawing bribery by United States corporations to foreign officials.¹¹⁶ At the same time, however, the bill attempts to solve the problems which have arisen under the Act as a result of its lack of clarity.¹¹⁷

¹⁰⁸ See Elden & Sableman, *supra* note 60, at 820-21; Timmeny, *SEC Enforcement of the Foreign Corrupt Practices Act*, 2 LOY. L.A. INT'L & COMP. L. ANN. 25 (1979). In a standard disclaimer, Timmeny indicated that the views expressed in his article were his own and not necessarily those of the SEC, the agency for which he was Deputy Director of Enforcement. *Id.*

¹⁰⁹ Elden & Sableman, *supra* note 60, at 821; Timmeny, *supra* note 108, at 31.

¹¹⁰ Timmeny, *supra* note 108, at 31.

¹¹¹ *Id.*

¹¹² Elden & Sableman, *supra* note 60, at 821.

¹¹³ See *supra* note 8.

¹¹⁴ Elden & Sableman, *supra* note 60, at 821-22.

¹¹⁵ See *supra* notes 8 and 9.

¹¹⁶ S. REP. NO. 209, *supra* note 8, at 3, 19.

¹¹⁷ *Id.* at 19.

In its report accompanying S. 708, the Senate Committee stated that, as a result of the FCPA's interpretive problems, United States businesses have lost legitimate export opportunities and have incurred unreasonable costs in attempting to comply with the Act's provisions.¹¹⁸ Thus, the preamble of the proposed bill sets forth four conclusions: (1) the principal objectives of the FCPA are important to the nation; (2) exporters should not be exposed to conflicting demands from diverse enforcement agencies; (3) compliance practices should be considered in balance with other national objectives; and (4) the United States should seek appropriate international cooperation to solve the problem of corrupt payments.¹¹⁹ Consistent with these conclusions, the proposed bill amends the FCPA's accounting standards,¹²⁰ consolidates enforcement of the Act's anti-bribery provisions in the Justice Department,¹²¹ clarifies the major ambiguities of the FCPA's anti-bribery provisions,¹²² and requires the President to pursue negotiations to establish international cooperation in the prohibition of bribery.¹²³

B. CLARIFICATION OF THE ANTIBRIBERY PROVISIONS

The proposed bill continues the prohibition against foreign bribery, but it is intended to clarify the ambiguities which have caused confusion and lost sales¹²⁴ among United States businesses attempting to comply with the FCPA. In so doing, however, the legislation opens a number of

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ S. 708, *supra* note 8, § 4; S. REP. NO. 209, *supra* note 8, at 10, 11-16, 20. The changes in the accounting standard contained in the proposed bill will not be discussed in this paper.

¹²¹ S. 708, *supra* note 8, § 5(a); S. REP. NO. 209, *supra* note 8, at 11, 16, 20.

¹²² S. 708, *supra* note 8, § 5(b)-(f); S. REP. NO. 209, *supra* note 8, at 10-11, 16-19, 20-21.

¹²³ S. 708, *supra* note 8, § 10; S. REP. NO. 209, *supra* note 8, at 11, 19, 22. Discussion of the advantages and disadvantages of bilateral and multilateral agreements is beyond the scope of this paper.

¹²⁴ During the hearings on S. 708, there was some testimony that the claim of lost export sales had never been substantiated. *See, e.g., Hearings on S. 708, supra* note 7, at 414-16 (testimony of William A. Dobrovir). Dobrovir cited the *Wall Street Journal* as reporting, on February 28, 1977, that corporate fears of business losses because payoffs had stopped had proved groundless. *Id.* at 415. Two years later, on February 19, 1979, *Newsweek* reported that "many American executives contend that they are losing business to foreign competitors," but also cited a report which concluded that "the impact on foreign sales hasn't been all that dramatic thus far." *Id.* In 1981, the General Accounting Office reported to Congress on the impact of the FCPA, as found in a survey of 250 companies. *Id.* at 416. The GAO found that 30% of the companies said they "had lost overseas business because of The [sic] Act," while a majority reported "little or no effect on their overseas business." *Id.* The GAO admitted that claims of lost sales are "difficult, if not impossible to substantiate and quantify" and noted that United States exports have increased since the Act. The GAO study concluded that the problem apparently was one of perception: "American companies believe that the Act puts them at a competitive disadvantage overseas." *Id.*; *see also id.* at 40-65; *infra* note 134 and accompanying text. *But cf.* Hearings on S. 708; *supra* note 7 at 386-87 (testimony of United States Trade Representative William E. Brock).

loopholes which should be tightened before the bill is passed by the full Congress.

Under the current Act, sections 103 and 104 are identical in all respects except one: section 103 concerns only "issuers"¹²⁵ — i.e., corporations registered under section 12 or required to file under section 15(d) of the 1934 Act — while section 104 only applies to "domestic concerns."¹²⁶ The proposed legislation would repeal section 103 of the FCPA and redefine "domestic concern" to include issuers.¹²⁷ Thus, the proposed section 104 would encompass both sections 103 and 104 of the FCPA. The separate provisions for issuers and domestic concerns exist because enforcement responsibility for the different entities is divided between the Department of Justice and the SEC. Since S. 708 consolidates enforcement responsibility,¹²⁸ the streamlining of sections 103 and 104 should not create any problems.

Under the current sections 103 and 104, the liability of officers and directors is unclear. Specifically, the wording of the provisions raises the question of whether officers and directors must be acting on behalf of the company to incur liability under the Act.¹²⁹ It is clear from the language of the proposed section 104, however, that officers, directors, employee, and shareholders must be acting on behalf of the domestic concern in order to be liable.¹³⁰ Although this revision narrows the reach of the FCPA, it is a more reasonable provision, if literally construed, and is probably consistent with the intent of Congress, under the original sections 103 and 104, to impose liability only where the officers, directors, or employees are acting on behalf of the company.

1. Liability for Third-Party Payments

No provision of the FCPA has caused American business greater problems than the provisions prohibiting payments to "any persons, while knowing or having reason to know" that a foreign official will ultimately receive the payment.¹³¹ This provision has caused serious problems because it imposes criminal liability on United States companies for the actions of others and does so without establishing clear stan-

¹²⁵ See *supra* note 41 and accompanying text.

¹²⁶ See *supra* notes 33 and 43 and accompanying text.

¹²⁷ S. 708, *supra* note 8, § 5(a).

¹²⁸ See *infra* notes 172-81 and accompanying text.

¹²⁹ See *supra* notes 52-53 and accompanying text. The language of the new section 104 covers "any officer, director, employee, or shareholder thereof acting on behalf of such domestic concern." The language of sections 103 and 104 of the FCPA covers "any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer." See *supra* note 41 for the full text of section 103 of the FCPA.

¹³⁰ S. 708, *supra* note 8, § 5(b).

¹³¹ See *supra* note 41.

dards for the companies to follow. These companies are required to determine with certainty that third parties will not engage in certain conduct and to risk criminal prosecution if their judgment is found to be incorrect.

During the hearings on S. 708, Theodore Sorensen, a strong advocate of the FCPA in 1977, stated that

no other provision of the Act has caused more confusion and deterred more export activity on the part of many an American businessman who had no intention to pay bribes but a great fear of finding himself unintentionally liable for the unauthorized, unforeseeable and unknown acts of the company's independent agents whose misdeeds, some prosecutor might some day allege, that businessmen had "reason to know."¹³²

Moreover, as the Senate Committee noted, "[t]he problem becomes particularly acute for small businesses [which] must do virtually all of their overseas business by means of foreign agents, over whom they may have very little or no control."¹³³

To illustrate the disincentives created by the FCPA's "reason to know" standard, United States Trade Representative William E. Brock provided case histories.¹³⁴ For example, a multinational United States-based engineering company spent approximately \$250,000 to evaluate its potential market in Latin America. Brazil, Mexico, and Venezuela were considered open markets for exporting engineering services and establishing local service branches. One of the major reasons the com-

¹³² *Hearings on S. 708*, *supra* note 7, at 405.

¹³³ S. REP. NO. 209, *supra* note 8, at 5.

¹³⁴ *Id.* at 6-7. See also *Hearings on S. 708*, *supra* note 7, at 385-87, where other examples were reported as follows:

The United States Embassy in Muscat, Oman, reported that a United States firm lost a \$20 to \$30 million contract solely because of the time delays needed to investigate sales agents and assess their responsibility for third parties under the FCPA.

In Liberia, United States firms will not risk hiring local agents because of potential liability under the FCPA for their unsanctioned actions. Instead, they have come to rely on more expensive expatriates with fewer ties to local business people. Thus, not only has the cost of business in Liberia gone up, United States firms have lost their competitive edge.

The United States embassy in the United Arab Emirates reported that overlap between business and government has been a problem for United States firms seeking to do business there. At best, the overlap has made it more difficult for United States firms to begin operations — in many cases, months pass while home office legal staffs review potential sponsorship agreements. Some firms have signed relatively ineffective agents rather than violate the FCPA, or at worst, have decided not to enter the market at all. At the same time, the United States image in the host country suffers because many reputable businessmen resent what they perceive as a questioning of their own honesty in business dealings.

In Qatar, only one of the state's fourteen cabinet ministers has no known business ties, and United States firms often fear that business payments may be construed as illicit payments to foreign officials. American firms there generally avoid agents in government positions, but they are then restricted to less effective agents with fewer business connections throughout the region.

Hearings on S. 708, *supra* note 7, at 385-87.

pany chose not to expand was its uncertain liability under the FCPA for the activities of independent agents and subcontractors. Moreover, the cost of policing such activities would have markedly lessened its price competitiveness. Another example involved a large Utah firm which had encountered difficulty in its efforts to obtain a local representative. After many discussions, the company narrowed the field to one Omani firm which it believed would best represent its interests. The firm, however, was unable to reach an agreement due to potential problems arising under the FCPA. Since the firm's business involved multimillion-dollar contracts concerning proprietary technology, lost exports from the United States may have been substantial.

In order to define the "reason to know" standard more precisely and to narrow its reach, the new legislation would make it unlawful for any United States corporation "corruptly" to "direct or authorize, expressly or by a course of conduct," a third party to bribe a foreign official.¹³⁵ The Senate Committee intended the term "course of conduct," used with the term "authorize," to refer to those situations in which a company, through its words or course of conduct, has demonstrated its intent that a corrupt payment be made.¹³⁶ The deletion of the phrase "reason to know," however, sparked a great deal of controversy and elicited much testimony.

In Senator Chafee's original proposal, section 104 banned only those third-party payments which a United States company "directs or authorizes."¹³⁷ Many of those who testified at the Senate hearings believed that this standard was at the opposite extreme of the "reason to know" standard. Theodore Sorensen predicted that the proposed language would invite "a wide-open return to the knowing wink and pregnant nod."¹³⁸ Philip Heymann, former Assistant Attorney General in charge of the Criminal Division of the Justice Department, testified that "[u]nless a corporation is so foolish as to direct or authorize the payment of bribes at a high level and relatively explicitly, no one is likely to be considered responsible."¹³⁹ Wallace Timmeny contended that "[t]he obvious problem with the 'directs or authorizes' standard is that it encourages an ostrich or a head-in-the-sand approach . . . a company could knowingly acquiesce in the improper conduct of an agent, or consciously avoid involvement in the awareness of an agent's activities, and avoid responsibility for and improper payments that may take place."¹⁴⁰

¹³⁵ S. 708, *supra* note 8, § 5(b).

¹³⁶ S. REP. NO. 209, *supra* note 8, at 17.

¹³⁷ *Hearings on S. 708, supra* note 7, at 8.

¹³⁸ *Id.* at 402, 405.

¹³⁹ *Id.* at 424.

¹⁴⁰ *Id.* at 435, 438.

As a result of this and other testimony, the Senate Committee amended Senator Chafee's bill to include the phrase "directs or authorizes, expressly or by a course of conduct."¹⁴¹ This amendment was intended to provide a new standard of corporate liability, midway between the "reason to know" standard and the "directs or authorizes" standard. As the Senate Report accompanying S. 708 explained, a company's refusal or failure to respond to an agent's suggestion or request that a corrupt payment be made would violate this section, as would a company's continuing employment of an agent known to the company to have made corrupt payments in the preceding two years in violation of applicable United States law or those of the country in question.¹⁴²

To clarify the proposed standard the Senate Report also provided examples of permissible conduct. For instance, the mere fact that a company does business in a country where corrupt payments are common, or employs an agent with personal relationships with government officials in the country where the company seeks to do business would not establish a prohibited course of conduct. Similarly, the payment of a commission that is higher than is customary would not, by itself, violate this section without evidence that the increased amount is intended to effect a corrupt payment.¹⁴³

Although this proposed standard is more precise than the "reason to know" test under the FCPA, a number of issues are left unresolved. For example, it is unclear whether mere knowledge that an agent would pay a bribe on behalf of the company satisfies the course of conduct standard and whether this knowledge is intended to be actionable. It is also unclear whether a reasonable person is liable if, under the circumstances, he should have known that a bribe would be paid.¹⁴⁴

Under the original language of the proposed bill — i.e., "directs and authorizes" — these questions would probably have been answered in favor of the corporation. With the addition of the "course of conduct" language, however, a loophole has been created which might exclude from liability firms which have knowledge of possible illegal payments but choose not to investigate the transactions to determine whether such payments are in fact being made. The firm's inaction would not necessarily be equivalent to a standard of "directs or authorizes, expressly or by a course of conduct" since the firm technically would not know whether illegal payments are occurring.

To avoid this ambiguity, additional language should be included in the proposed bill which would force companies to take action where

¹⁴¹ S. 708, *supra* note 8, § 5(b).

¹⁴² S. REP. NO. 209, *supra* note 8, at 17.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 28-29 (letter of Senator Proxmire).

illegal payments are suspected. Thus, the provision could be drafted along the following lines: "Section 104(b):¹⁴⁵ a domestic concern violates subsection (a)¹⁴⁶ by circumventing the proscriptions thereof (i) where a payment, gift, offer, or promise of anything of value by any person is made corruptly to a foreign official¹⁴⁷ in connection with activities within and for any of the purposes set forth in subsection (a), (ii) where the domestic concern corruptly directs or authorizes, expressly or by a course of conduct, such payment, gift, offer, or promise, or (iii) *where the domestic concern obtains knowledge that such a payment, gift, offer, or promise may be occurring and fails to investigate and take action to prevent such a payment, gift, offer, or promise.*" [Author's recommendations in italics.]

The new standard would resolve the "knowledge" issue which the language of the proposed bill leaves open. It would cover situations in which a company received information directly—or received various items of information which would lead a reasonable person to suspect—that a foreign subsidiary, or an independent person or company acting as a sales representative of an American business overseas, was engaging in illegal payments. The firm would then have the responsibility to investigate the matter. If it found the information to be valid, the firm would be required to take action to prevent the illegal transaction—e.g., by firing the sales representative who made the payment. If this new language is adopted together with a clearer definition of "illegal payments" as discussed below, the major ambiguities inherent in the current FCPA will be resolved while the original goals of the Act remain intact.

¹⁴⁵ Section 104 of S. 708, *supra* note 8, § 5(b), provides in pertinent part:

Sec. 104(a) It shall be unlawful with respect to activities in the interstate or foreign commerce of the United States for any domestic concern, or any officer, director, employee, or shareholder thereof acting on behalf of such domestic concern, corruptly to pay, give, offer, or promise, directly or indirectly, anything of value to any foreign official for the purpose of —

(1) influencing such foreign official to act or make a decision in his official capacity, including a decision to fail to perform his official functions, in violation of the recipient's legal duty as a public servant; or

(2) inducing such foreign official to use his influence with a foreign government or instrumentality thereof in violation of the recipient's legal duty as a public servant; in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) A domestic concern violates subsection (a) by circumventing the proscriptions thereof where a payment, gift, offer, or promise of anything of value by any person is made corruptly to a foreign official in connection with activities within and for any of the purposes set forth in subsection (a), and where the domestic concern corruptly directs or authorizes, expressly or by a course of conduct, such payment, gift, offer, or promise.

¹⁴⁶ *Id.*

¹⁴⁷ "Foreign official" is defined in S. 708, *supra* note 8, § 5(f)(2) to include officers and employees of foreign governments and agencies, political parties, party officials, and candidates.

2. *Exemptions for Certain Payments*

During the hearings on the FCPA, Congress recognized the distinction between bribes and "grease" or facilitating payments. They heard testimony that "[m]any companies have indicated that 'facilitating' payments to low-level officials are customary and legal in certain parts of the world and that continuation of such payments is necessary in order to transact business."¹⁴⁸ The reports of both the Senate and the House committees stated that the "statute does not . . . cover so-called grease payments."¹⁴⁹ On the floor of both Houses, key legislators involved in the enactment of the FCPA made similar remarks.¹⁵⁰

Congress intended the FCPA to deal indirectly with the issue of facilitating payments by focusing on the type of official involved. Specifically, "foreign official" is defined not to include "any employee of a foreign government or any department, agency, or instrumentality thereof *whose duties are essentially ministerial or clerical*."¹⁵¹ Under the FCPA, payments to a foreign government employee who falls within this exclusion are outside the statutory proscription.

This approach, however, has proved somewhat arbitrary and quite difficult to apply in practice due, in part, to the multitude of relationships and responsibilities of employees in foreign countries.¹⁵² Even in the United States federal government, it is difficult to know when an official has "essentially ministerial or clerical" duties. The problem is acute in foreign countries where the duties of government employees may be less clearly articulated or not readily available in published form.¹⁵³

The proposed bill employs a different approach. While the FCPA seeks to define facilitating payments in terms of recipients, the new legislation would define such payments in terms of their purpose.¹⁵⁴ It provides for five categories of exceptions: (1) facilitating or expediting payments to a foreign official, the purpose of which is to expedite or secure the performance of a routine government action as opposed to one involving judgment as a significant factor; (2) items lawful under the laws of the foreign official's country; (3) items which constitute a courtesy, or a token of regard or esteem, or are given in return for hospi-

¹⁴⁸ *Foreign Payments Disclosure*, *supra* note 10, at 20.

¹⁴⁹ S. REP. NO. 114, *supra* note 2, at 10; H.R. REP. NO. 640, *supra* note 2, at 8.

¹⁵⁰ See 123 CONG. REC. 38601-02, 38778, 36304 (statements of Senator Tower, Congressman Devine, and Congressman Eckhardt, respectively).

¹⁵¹ Emphasis added. See *supra* notes 63-70 and accompanying text.

¹⁵² S. REP. NO. 209, *supra* note 8, at 18.

¹⁵³ *Hearings on S. 708*, *supra* note 7, at 151 (statement of the Emergency Committee for American Trade).

¹⁵⁴ S. REP. NO. 209, *supra* note 8, at 18.

tality; (4) expenditures associated with the selling or purchase of goods or services or with the demonstration or explanation of products; and (5) ordinary or customary expenditures associated with the performance of a contract.¹⁵⁵

Although the proposed bill defines more clearly, and excludes from the Act's coverage more explicitly, facilitating or "grease" payments, courtesy and hospitality gifts and expenses, and disbursements incurred in connection with product or operation demonstrations or explanations, it also creates several loopholes. For example, the proposed bill loosely includes in the definition of excluded gifts anything that is "intended" as nothing more than an act of courtesy, esteem, or reciprocal hospitality. It would be difficult to prove that the most lavish bribe was not "intended" in an innocent vein if the donor papers the record with care.¹⁵⁶

In addition, where the payment is customary rather than specifically permitted by a local law or regulation, it may not be easy to determine its legality. Presumably, the burden would be on the government to prove that a payment made was not customary. The prosecution's ability to produce such evidence will be limited in many cases, as will the defendant's ability to produce opposing evidence.

The new bill would also exclude from its coverage payments which are lawful in the recipient country. Under the current Act, there is confusion as to whether the actions of United States businesses should be judged under United States legal standards or those of the foreign country. The proposed bill makes clear that American businesses will not be prohibited from engaging in conduct that is lawful under the applicable local laws and regulations. This amendment, for example, would allow corporate political contributions in those countries where they are entirely legal.¹⁵⁷ Similarly, the provision would permit United States companies to retain the services of individuals who serve as part-time public servants and are authorized by local law to perform outside activities provided that they avoid conflicts of interest.

This is clearly a huge loophole. In 1976, the Law Library of Congress prepared several studies which demonstrated that many developed and developing countries had legislation prohibiting bribery of public officials to secure business.¹⁵⁸ Since the strictness of each country's laws

¹⁵⁵ *Id.*

¹⁵⁶ *Hearings on S. 708, supra* note 7, at 405 (testimony of Theodore Sorensen).

¹⁵⁷ *Id.* at 152 (statement of the Emergency Committee for American Trade).

¹⁵⁸ *Id.* at 52; *see also* LIBRARY OF CONGRESS, A COMPILATION OF BRIBERY AND EXTORTION LAWS IN OPEC COUNTRIES (NO. 76-1076LL); LIBRARY OF CONGRESS, BRIBERY LAWS IN DENMARK, ENGLAND, FRANCE AND THE FEDERAL REPUBLIC OF GERMANY (NO. 76-1249LL).

and the degree of enforcement undoubtedly differ, American companies could circumvent Congressional prohibitions. Imposing United States legal standards on American businesses, however, without altering them for international commercial transactions, could hinder these transactions to a greater degree than necessary to achieve the objectives of the Act.

For example, corporate political contributions are not permitted in the United States but are allowed in other countries. To forbid American corporations from making such contributions could place them at a disadvantage if such contributions are customarily made by foreign corporations doing business in the country. To resolve this problem, Congress should establish a monetary limit on such contributions. American businesses would be required to report all such contributions; any payment in excess of the limit would be subject to approval by the Justice Department. Similarly, Congress should require American businesses to report the name and salaries of part-time foreign public servants whose services are retained by American companies. In this latter case, it would be unrealistic to impose a limit on the amount of money to be paid to these part-time foreign public servants. Justice Department officials could review the compensation on a case-by-case basis. The officials could, *inter alia*, compare the salaries paid to the company's other employees with the salary paid to the part-time foreign official. The American company could, of course, provide arguments and documentation supporting their compensation figure. If the Department of Justice still considered the salary to be excessive, however, it would have to be reduced.

A third problem involves the Senate Committee's attempt to distinguish situations involving government action in which the exercise of a foreign official's judgment is a significant factor. The Committee stated that judgment in this context refers to the decisions by a foreign official regarding whether, or on what terms, to award new business or to continue business with a particular party.¹⁵⁹ A foreign official, however, even at the highest level and bearing responsibility for allocating a contract to one of several competitors, could very simply structure a bribe from one competitor so that it appeared to be a payment for "expediting" his decision.¹⁶⁰

To avoid this problem, the proposed bill should again establish an annual dollar limit to be placed on the exempted payments. For example, any payment of less than \$1,000 to a foreign official, as defined in

¹⁵⁹ S. REP. NO. 209, *supra* note 8, at 18.

¹⁶⁰ *Hearings on S. 708, supra* note 7, at 426 (testimony of Philip B. Heymann).

the proposed bill, would not be a violation of the statute.¹⁶¹ Thus, in determining whether a payment is exempted from the prohibitions of the proposed legislation, there would be no need to become entangled with questions of custom or intent. This minimal value test, of course, could be easily amended to adjust for inflation or other economic circumstances.

During the hearings on S. 708, some witnesses recommended that the list of payments to be explicitly defined and exempted from the prohibitions should include extortion.¹⁶² The legislative history of the FCPA indicates an intent to exclude it, but by example defines it too narrowly to be meaningful.¹⁶³ Although it is difficult to distinguish extortion from bribery, criminal codes have drawn the line.¹⁶⁴ As Mr. Sorensen noted during his testimony, "[s]ome foreign payoffs are genuinely coerced, not only from businessmen threatened with injury of their persons or property but from those threatened—by government officials or others, even their own agents—with the loss of their entire investment."¹⁶⁵

Since extortion is such a serious crime and carries heavy penalties, it is unlikely that American companies would attempt to characterize an otherwise illegal payment as extortion. To do so would, for example, submit the foreign sales representative to criminal penalties for extortion, thus defeating any advantage gained by making the payment. It appears, therefore, that an exemption for extortion would not create any unforeseen problems or loopholes.

3. *The Exclusivity Provision*

The Senate Report accompanying S. 708 indicates that the proposed legislation would preclude the possibility of criminal prosecution on the grounds that the mail or wire fraud laws have been violated as a result of a foreign corrupt payment.¹⁶⁶ This exclusion avoids inappropriate overlapping and conflict between the FCPA and the mail and wire fraud statutes which could occur if the latter were extended to proscribe conduct not comprehended, expressly or otherwise, under the FCPA.¹⁶⁷ Thus, the intent of the Senate Committee appears consistent with the general principles of statutory construction: i.e., while the gov-

¹⁶¹ See, e.g., *id.* at 405, 426, 438 (statements of Theodore Sorensen, Philip B. Heymann, and Wallace L. Timmeny, respectively).

¹⁶² *Id.* at 406 (statement of Theodore Sorensen).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ S. 708, *supra* note 8, § 7; see also S. REP. NO. 209, *supra* note 8, at 21.

¹⁶⁷ See *Hearings on S. 708*, *supra* note 7, at 433 (testimony of Harvey L. Pitt).

ernment should not be unduly restricted in applying a variety of federal laws to reprehensible conduct, if Congress isolates offensive conduct and imposes prohibitions on that conduct, the government should not apply generalized statutes to prohibit conduct which Congress did not expressly proscribe.¹⁶⁸

The exclusivity language of S. 708, however, could be read as prohibiting the application of all other statutes to instances of foreign bribery.¹⁶⁹ As one witness noted during the hearings on S. 708, the provision "appears to immunize murder or obstruction of justice if carried out in furtherance of a corrupt payment."¹⁷⁰ In order to clarify this ambiguity, the language of the proposed bill should indicate that actions are immunized only if they would be legal but for the intent and effort to bribe foreign officials. If, however, the intent of the exclusivity provision is to preempt certain specified statutes, (e.g., the mail and wire fraud statutes), the provision should state with particularity those statutes which are intended to be preempted.¹⁷¹

C. CONSOLIDATION OF ENFORCEMENT RESPONSIBILITIES

A major amendment contained in the proposed bill would place in the Justice Department all jurisdiction for enforcement of the anti-bribery provisions.¹⁷² The SEC would remain responsible for civil enforcement of the internal accounting controls and relevant securities laws. Under the current Act, the SEC has authority to enforce the civil provisions of the anti-bribery provisions against "issuers," while the Justice Department is responsible for enforcing the civil and criminal provisions against "domestic concerns." The SEC has indicated that it does not oppose such consolidation.¹⁷³

During the hearings prior to the enactment of the FCPA, a number of reasons were advanced for the division of enforcement responsibilities: (1) the SEC has traditionally been effective in protecting the investing public by instituting civil litigation; (2) the SEC is in a relatively superior position to investigate reporting companies alleged to have bribed foreign officials because of its immediate access to company books and periodic filings; (3) retaining SEC jurisdiction in the case of reporting companies will avoid costly duplication of effort; (4) the SEC had been effective in discovering foreign bribery prior to the FCPA; and (5) be-

¹⁶⁸ *Chiarella v. United States*, 445 U.S. 222, 235 n.20 (1980).

¹⁶⁹ *See, e.g., supra* note 79.

¹⁷⁰ *Hearings on S. 708, supra* note 7, at 426 (testimony of Philip B. Heymann).

¹⁷¹ *Id.* at 547 (statement of the American Bar Association).

¹⁷² S. 708, *supra* note 8, § 5(b).

¹⁷³ Securities Exchange Release No. 34-18255, FED. SEC. L. REP. (CCH) ¶ 26,629 (Nov. 12, 1981).

cause some investigations are likely to be politically sensitive, it would be preferable to have investigations conducted by an independent agency answerable to Congress rather than the Executive branch.¹⁷⁴ Congress also expected close cooperation between the SEC and the Justice Department at the earliest stage of any investigation to ensure that the evidence needed for a criminal prosecution would not become stale.¹⁷⁵

Although the arguments in favor of dual jurisdiction are somewhat persuasive, stronger arguments can be made in opposition to this policy. The history of joint enforcement of the Act does not support the efficiency and expertise arguments, especially in light of the criticisms regarding the FCPA Review Procedure. Further, the lack of SEC participation in the Review Procedure is a strong indication that the cooperation between the agencies which Congress intended has not been achieved. Moreover, the investigation of illegal payments to foreign officials is at best only indirectly related to the SEC's primary responsibility to protect investors. Not only is there likely to be duplication of efforts and resulting governmental inefficiency, but the Justice Department already has sufficient expertise in investigating and prosecuting domestic bribery cases.¹⁷⁶

Persuaded by arguments against dual jurisdiction, the Senate Committee proposed a consolidation of enforcement responsibilities.¹⁷⁷ The majority of comments received during the hearings on the proposed legislation, including those of the SEC, were not opposed to this consolidation.¹⁷⁸ It is clear, that this consolidation would provide greater certainty in interpretation and enforcement by eliminating the confusion that results from overlapping jurisdiction, exacerbated by one agency's unwillingness to be bound by the interpretations of another.

In response to criticism regarding the lack of general guidance provided to businesses under the Justice Department's Review Procedure, the proposed legislation gives the Justice Department's Review Procedure more authority and imposes stricter requirements.¹⁷⁹ Specifically, the Department's statement that proposed conduct would not violate the Act would be "final and binding on all parties" which would presumably include the SEC and the Internal Revenue Service. Moreover, in contrast to the current procedure, responses to requests for statements

¹⁷⁴ H.R. REP. NO. 640, *supra* note 2, at 9; *see also* Note, *supra* note 16, at 376.

¹⁷⁵ *Id.* at 377. H.R. REP. NO. 640; *supra* note 2, at 10; S. REP. NO. 114, *supra* note 2, at 12; *Hearings on S. 708, supra* note 7, at 339.

¹⁷⁶ H.R. REP. NO. 640, *supra* note 2, at 20-21; *see also* Note, *supra* note 16, at 377.

¹⁷⁷ *See, e.g., Hearings on S. 708, supra* note 7, at 80, 205, 244, 331, 338, 448, 513, 540.

¹⁷⁸ *Id.*

¹⁷⁹ S. 708, *supra* note 8, § 8.

of enforcement intentions would be due from the Justice Department within thirty days.¹⁸⁰ Finally, documents and all materials submitted in regard to a Review Procedure request would be exempt from disclosure under the Freedom of Information Act.¹⁸¹

These amendments meet the basic criticisms of the Justice Department's Review Procedure. Presumably, firms will be able to act more quickly on proposed business transactions and without fear of disclosure of confidential information. The proposed changes would therefore make the Review Procedure more certain and thus, more useful.

V. CONCLUSION

The underlying objectives of the FCPA have generally been supported by the business community, the Congress, and the public. Yet, ambiguities in the Act have caused many businesses to call for the rescission rather than the reformation of the Act. This has occurred because many American corporations may be foregoing legitimate international business transactions in order to avoid possible civil and criminal penalties for violations of ambiguous provisions of the Act. Congress is attempting to resolve this problem by amending the FCPA.

The proposed bill clarifies many of the ambiguities of the Act and narrows its reach in certain areas. Moreover, it generates certainty by consolidating enforcement responsibility in the Department of Justice. Yet, the bill also creates a number of loopholes. It is therefore necessary for Congress to revise this pending legislation. For example, Congress should further clarify its "directs and authorizes, expressly or by a course of conduct" standard in order to force companies to take action where illegal payments are suspected.¹⁸² Moreover, Congress should establish a dollar limit or a minimal value test for those payments to foreign officials which are allowed under the proposed Act.¹⁸³

Although some businesses may object to these more specific restrictions, the overriding policy of prohibiting corporate bribery of foreign officials should prevail. Outlawing such bribery is crucial to, *inter alia*,

¹⁸⁰ The Review Procedure presently provides that responses to review requests should be given within 30 days: "The Criminal Division will make every reasonable effort to respond . . . within 30 days after receipt of the review request and of any requested additional information and documents." 28 C.F.R. § 50.18(i). Requests for "additional information" could be extensive and cause the review process to last for months. Such delays could enable foreign competitors to gain an advantage. Thus, the proposed legislation provides that "[t]he Attorney General shall issue opinions, within thirty days, in response to requests from domestic concerns, regarding compliance with the requirements of the provisions of section 104 of this Act." S. 708, *supra* note 8, § 8.

¹⁸¹ S. REP. NO. 209, *supra* note 8, at 11.

¹⁸² See *supra* notes 135-47 and accompanying text.

¹⁸³ See *supra* notes 156-61 and accompanying text.

preventing the distortion of commercial competition and avoiding foreign policy problems.¹⁸⁴ If the suggested changes are incorporated into the proposed bill, large loopholes will be tightened, and the original goals of the FCPA will be furthered.

TAMARA ADLER

¹⁸⁴ See *supra* notes 23-27 and accompanying text.